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No. 79-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR,
Petitioner,

v.

AMERICAN TRADING AND PRODUCTION CORP.,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of New York

REPLY OF PETITIONER

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REPLY OF PETITIONER

Petitioner submits this reply in response to the opposition to certiorari filed by respondent. Respondent's opposition offers no persuasive reason for denying certiorari in this case. On the contrary, respondent's own arguments confirm that the New York appellate courts, in direct contravention of this Court's settled precedents, have invaded the province of the jury in a case of this type, thus warranting summary reversal by this Court.

1. Respondent argues principally that certiorari should be denied because at trial petitioner claimed that the S.S. Washington Trader was unseaworthy due to overloading for the zone of the Pacific in which it was sailing when Master Blume was lost. Opp. at 3-4, 11-14. This argument is patently untenable.

Unseaworthiness due to overloading and course setting was, to be sure, one of the theories that petitioner pursued as a part of his affirmative case at trial. But, as the record makes clear, petitioner also introduced evidence of unseaworthiness and negligence due to a number of other factors, including loss of rudder control (Tr. 833-34, 839-40, 1376-77), a broken guardrailing in the area where the Master had last been seen inspecting the ship for damage in heavy seas (Tr. 126a-126b, 425-26), and failure of the ship's crew to initiate rescue efforts in a timely fashion (Tr. 122-35, 142). All these latter theories were submitted to the jury on instructions that the dissenting judge below termed "impeccable" and that neither the Court of Appeals nor the Appellate Division questioned in any respect. Tr. 1565-1572, 1582-86. The claim of unseaworthiness based on the ship's loading and course setting, however, was not even sent to the jury in connection with petitioner's affirmative case.[1]

Under these circumstances, it is simply irrelevant for present purposes that petitioner attempted—unsuccessfully—to establish liability on, among other things, a theory concerning the ship's loading and course. Even the Appellate Division, in overturning the jury's verdict, did not suggest—as respondent apparently believes—that petitioner is barred from recovering on theories of rudder failure, broken guardrailing and so forth because the trial court dismissed an alternative and independent theory advanced by petitioner. On the contrary, it is quite clear that the Appellate Division's decision rests on the view that once the issues of loading and course had been removed from the jury's consideration as a part of petitioner's case, there then was not "sufficient" evidence to sustain the jury's verdict on any of petitioner's other, separate theories. Pet. App. 2a.

[1] In the trial judge's view, the Master was solely responsible for the loading and the course setting, and consequently these matters could not properly form a basis of recovery for the Master's death. Tr. 1527-28, 1552-54.

It is on this latter point that the New York appellate courts seriously erred, thus requiring the grant of certiorari and reversal of the decision below. It is no answer here that petitioner pursued before the trial court a theory concerning the ship's loading and course that was never even sent to the jury as a part of petitioner's case.[2]

2. Respondent ultimately does not dispute—as it cannot—that under this Court's decisions the New York appellate courts were required to sustain the verdict in the trial court if there was some evidence, "however small," to support it under any theories of liability sent to the jury. See, *e.g.*, *Rogers* v. *Missouri P.R.R.*, 352 U.S. 500, 508 (1957); *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523 (1956). Petitioner has already cited (Pet. at 11-17) three examples of record evidence, each of which is independently sufficient to demonstrate that there clearly is not the "*complete absence of probative facts*" required before the jury's verdict in this case may be set aside. *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946) (emphasis added).

Unable to refute the presence of such evidence in the record, respondent has resorted instead to citing contrary evidence from the record and suggesting alternative inferences that could be drawn from the evidence. Opp. at 14-21. By so doing, respondent has simply confirmed that this case was properly sent to the jury, that there was evidence in the record to support the jury's verdict, and that the New York appellate courts improperly usurped the jury's function by overturning the verdict for "insufficiency of proof" and dismissing petitioner's case. Pet. App. 4a.

[2] The trial court did send the Master's own conduct, including specifically the issue of course setting, to the jury as a part of respondent's case on contributory negligence (Tr. 1587-88, 1616); and the jury's verdict included a finding of ten percent contributory negligence on the part of the Master (Pet. App. 1e). The trial court's treatment of the Master's fault in connection with his own death clearly was proper. See, *e.g.*, *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408-09 (1953) ("[A]dmiralty has developed and now follows its own fairer and more flexible rule which allows . . . consideration . . . in mitigation of damages as justice requires."). See also Pet. App. 5b (dissenting opinion of Judge Fuchsberg.)

First, with regard to the issue of rudder loss, respondent does not deny that there was in fact evidence of steerage loss on December 16, 1966 (Pet. at 12-13) and that the Appellate Division was simply wrong in asserting otherwise. Nor does respondent deny that the loss of steerage constituted a serious, unseaworthy condition for which it was responsible. Rather, respondent now offers a new theory to escape liability. It suggests that the damage necessitating the Master's fatal inspection trip was the result not of the rudder loss and the ship's "broaching to" in the heavy seas but rather of the ship's overloaded condition, for which the Master was responsible. Opp. at 14.

The short answer to this argument is that there was ample evidence from which the jury could have inferred that the rudder loss contributed directly to the ship's damage and thereby to the Master's loss. For example, the Chief Mate testified that when the ship lost steerage early on December 16, "the ship went broached to in the sea,"[3] the crew "had no control over the vessel," and the ship then suffered damage. Tr. 833-34; A1779-81. And the Chief also testified that early on the morning of December 16 he was called to the ship's bridge and told by the Master that the ship had "lost her steerage and . . . had sustained some damage on deck . . . ." Tr. 839-40. See also Tr. 1382, 1567.

The trial court fully and properly instructed the jury that it had to find a "direct causal relationship" between the unseaworthy condition of the rudder and the loss of the Master in order to decide for petitioner.[4] Tr. 1566-67. It was the jury's

[3] That is, the ship "laid in the trough of the sea" broadside, subject to the pounding of the waves. Tr. 833.

[4] The trial court explained to the jury that the requirement of such a causal relation did *not* mean that the rudder loss must be the "sole reason" for the loss, but rather that it "must be one of the reasons which proximately led to that loss, together with the other things which may have contributed." Tr. 1567. Respondent now implies (Opp. at 15) some disagreement with the trial court's instruction on causation, but it raised no objection to this instruction before the trial court. Tr. 1614-16.

function to make this determination based on the evidence in the record. See, *e.g.*, *Tennant* v. *Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944). Respondent's present attempt to reargue the evidence affords no basis whatsoever for sustaining the appellate courts' unwarranted interference with the jury's decision.[5]

Second, respondent acknowledges that the record contains evidence that the guardrailing was broken in the area where the Master had last been seen inspecting the ship for damage. Opp. at 16. But, like the Appellate Division, respondent contends that it is mere speculation that the broken railing contributed to the Master's loss. Opp. at 16.

In so arguing, respondent simply ignores Seaman Kuberski's acknowledgement at trial that there was nothing other than the broken railing "to prevent anything or anybody from going over the side" in the area where heavy seas had struck and the Master had last been seen.[6] Tr. 127, 121-27. Thus, the evidence placed the Master in a dangerous situation in which the guardrailing was essential to his safety. From such evidence, the jury clearly was entitled to find that the broken condition of the railing had played a part in the Master's death.

[5] As Judge Fuchsberg noted in the court below, "it was for the jury alone to determine, as it did, what role [the loading and course-setting of the ship] played on the issue of proximate cause or as a contributing factor in diminution of a recovery for negligence." Pet. App. 5b.

[6] Contrary to what respondent seems to believe, the jury certainly was not prevented from relying on such testimony in finding for petitioner simply because an expert witness speculated that the Master might first have been "knocked unconscious against a railing or bulkhead or washed directly into the sea." Opp. at 16. "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & P.U. Ry.*, *supra*, 321 U.S. at 35. And the jury's "conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored." *Id.*

See, *e.g.*, *Schulz* v. *Pennsylvania R.R., supra,* 350 U.S. at 523; *Lavender* v. *Kurn, supra,* 327 U.S. at 652-53.[7]

Indeed, as the dissenting Judge below noted, at trial "defendant's counsel agreed that whether the guardrails were unseaworthy and, if so, proximately causative of the death, was a question of fact for the jury." Pet. App. 4b; see Tr. 1480-82. On this basis alone, the jury's verdict should have been sustained, and the appellate courts below patently erred in concluding otherwise.[8]

Third, respondent does not deny that the Appellate Division erred in asserting "[t]here is no evidence that the crew members should have known that the Master was washed overboard. . . ." (Pet. App. 4a). There clearly was. See Pet. at 14-15.

Respondent now argues instead that the crew's negligence in failing to initiate rescue efforts until hours after the Master disappeared is somehow excusable because the Master supposedly could not have survived for long after being swept overboard. Respondent relies solely on a remark by Seaman

[7] In light of the evidence specifically placing the Master in dangerous circumstances in the area where the guardrail was broken, this case is readily distinguishable from *Chicago, M. & St.P. Ry.* v. *Coogan,* 271 U.S. 472 (1926), and *Swords* v. *American Sealanes, Inc.,* 443 F.2d 1324, 1325-26 (4th Cir.), *cert. denied,* 404 U.S. 948 (1971), upon which respondent relies (Opp. at 11 & 18). In both *Coogan* and *Swords,* there was *no* evidence from which the juries could have inferred that the dangerous conditions identified in each case played any part in the accidents for which recovery was sought. The same is not true here.

[8] Respondent now makes much of evidence concerning the force of the water that struck the area where the Master was last seen. (Opp. at 17.) However, as the decision in *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.,* 10 F.2d 47, 49 (2d Cir. 1925), upon which respondent itself relies (Opp. at 16-17), makes clear, such evidence does not alter the essential fact that it is "a question about which reasonable men might at least differ whether the intestate would not have been saved, had [the railing] been there."

Kuberski suggesting that the Master could have survived only a few minutes in the water. Opp. at 20. It is hard to understand how this testimony serves to absolve respondent of liability for its crew's negligence in failing to search immediately for the Master at the time he was washed overboard.[9] But, in any event, there was evidence before the jury that the Master could in fact have survived for a very considerable period of time in the sea conditions that existed when he disappeared. Tr. 483-487.[10]

As a result, despite respondent's present argument, there clearly was sufficient evidence from which the jury could have determined that the negligent failure of respondent's crew to initiate timely rescue efforts contributed to the Master's death.[11]

[9] Certainly, there was evidence indicating that the crew should have realized immediately that the Master had been swept overboard and should have responded to his plight at once. See Tr. 126-26a & 134; Pet. at 14-16. This same point disposes of respondent's suggestion that there was no evidence at trial as to whether Master Blume could swim. Opp. at 18.

[10] Among other things, Captain Ash, an expert witness for the plaintiff, testified at trial that the temperature of the water in which the Master disappeared was such that "a man could survive for a number of hours;" that so long as the Master "had the buoyancy, he would just ride up and down with the waves;" "that there have been cases where men have survived under even worse conditions;" and that he did "not agree" with Kuberski's suggestion that a man could not have survived "for five minutes in those waters." Tr. 486.

[11] Likewise, there was sufficient evidence from which the jury could have found that the Chief Mate negligently failed to repair the broken railing prior to the Master's loss. See Pet. at 14 n.22. Respondent argues in effect that the Mate acted reasonably in not fixing the railing or stringing lifelines (Opp. at 20), but that was a question for the jury to decide, see, *e.g.*, *Schultz* v. *Pennsylvania R.R., supra,* 350 U.S. at 526.

Consequently, there was ample basis for the jury's findings of negligence in this case.[12]

3. In sum, respondent has brought forth nothing to dispel the conclusion that the New York appellate courts erred in overturning the jury's verdict and dismissing petitioner's case for lack of sufficient evidence. There clearly was "an evidentiary basis for the jury's verdict," and there can be no question but that under this Court's prior decisions the verdict should therefore have been sustained. See, *e.g.*, *Lavender* v. *Kurn*, *supra*, 327 U.S. at 653; *Tennant* v. *Peoria & P.U. Ry.*, *supra*. What is more, respondent does not dispute that the decision below, if allowed to stand uncorrected, could ultimately have a severe adverse impact on large numbers of other seamen's rights to a jury-adjudication of their negligence and unseaworthiness claims. Pet. at 18. Given the considerable significance of the decision and the fact that it is patently wrong under this Court's prior precedents, the Court should—as it has often done in analogous circumstances in the past[13]—grant certiorari, summarily reverse and direct that the jury's verdict be reinstated.[14]

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[12] Indeed, where, as here, the injured seaman makes a prima facie showing that he was injured and that the shipowner's crew was negligent in some respect, the only way in which the shipowner can avoid a jury verdict of liability is "to establish by indisputable and uncontroverted evidence both the cause of the accident and its own freedom from negligence." G. Gilmore & C. Black, *The Law of Admiralty* 378 (2d ed. 1975). Respondent does not even claim to have met this burden here.

[13] See generally *Harris* v. *Pennsylvania R.R.*, 361 U.S. 15, 19-21 (1959) (appendix to concurring opinion of Douglas, J., citing and categorizing cases).

[14] Respondent suggests in a lengthy footnote (Opp. at 10 n.9) that the trial judge erred in adding prejudgment interest to the jury's award to petitioner. Pet. App. at 1d-2d. However, that issue is not now before this Court (cf. Pet. App. 4a), and the *trial judge's* award of prejudgment interest obviously is no bar to reinstatement of the *jury's verdict*.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted, the decision below summarily reversed, and the case remanded with instructions to reinstate the jury's verdict. Alternatively, certiorari should be granted and the case set for plenary review.

Respectfully submitted,

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